TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Ordinances of the City of Opelika, Alabama

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1956

NO. 478

WEST POINT WHOLESALE GROCERY
COMPANY,

APPELLANT,

VS.

THE CITY OF OPELIKA, ALABAMA,

APPELLEE.

APPEAL FROM THE COURT OF APPEALS
OF ALABAMA

BRIEF ON THE MERITS.

STATEMENT OF THE CASE

There is no error in the Statement of the Case contained in the Appellant's Brief and further statement will not be here made. The Appellee is satisfied with the reference to official reports, statement of jurisdictional grounds, constitutional provisions and ordinances involved, and the grounds presented, as set forth in Appellant's Brief.

SUMMARY OF ARGUMENT

I

The Opelika Ordinance under review—Section 130 (a) of Ordinance No. 101-53, as amended by Ordinance No. 103-53, is a tax levied on the local incident of delivery and hence the same does not violate the Commerce Clause of the Constitution of the United States. There is no prohibition against a flat sum license levied on the local incident of delivery. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565.

II

Under the laws of Alabama the City of Opelika has the power to classify businesses for license purposes. The classification made in Ordinance No. 130(a) is not inherently discriminatory and has a reasonable basis. The burden rested on the Appellant to allege in its complaint facts showing such a discrimination and the complaint fails so to do and demurrers were properly sustained to the same.

Title 37, Section 735, Alabama Code of 1940
American Bakeries Co. v. City of Opelika, 229 Ala. 388, 157 So. 206

American Bakeries Co. et al v. City of Huntsville, 232 Ala. 612, 168 So. 880, appeal dismissed *American Bakeries Co. v. City of Huntsville*, 57 S. Ct. 122, 299 U. S. 514, 81 L. Ed. 380

City of Roanoke v. Robertson, 30 Ala. App. 1, 200 So. 437, Cert. denied 200 So. 439

City of Enterprise v. Fleming, 240 Ala. 460, 199 So. 691

Woco Pep Co. of Montgomery v. City of Montgomery, 219 Ala. 73, 121 So. 64

Edgil v. City of Carbon Hill, 214 Ala. 532, 108 So. 355

Town of Guntersville v. Wright, 223 Ala. 349, 135 So. 634

Sanford v. City of Clanton, 31 Ala. App. 253, 15 So. 2d 303, Cert. denied 244 Ala. 671, 15 So. 2d 309

State v. Coca-Cola Bottling Works, 29 Ala. App. 508, 198 So. 363

Sanford v. City of Andalusia, 256 Ala. 507, 55 So. 2d 856

State v. Cater, 184 Iowa 667, 169 N. W. 43

City of Troy v. Western Union Telegraph Co., 51 So. 523, 164 Ala. 482, 27 L. R. A. 627

Van Hook v. City of Selma, 70 Ala. 361

Southern Liquid Gas Co. v. City of Dothan, 44 So. 2d. 744, 253 Ala. 350.

ARGUMENT

I

The Opelika license ordinance is levied on the incident of delivery and does not violate the Commerce Clause of the Constitution. Section 130(a) of the Ordinance levies a license on any firm, person or corporation, who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika. This is clearly a tax on the incident of delivery and not upon goods shipped in interstate shipment. The legality of a tax on the incident of delivery has been conclusively decided in the case of *McGoldrick v. Berwind-White Coal Mining Co.*, supra.

The cases of *Nippert v. City of Richmond*, 327 U. S. 416, *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U. S. 389, and *Robbins v. Shelby County Taxing District*, 120 U. S. 489, are not in point. In each of these cases a license was levied on the solicitation of sales to be later consummated by delivery in interstate commerce. We challenge the statement that this Court has consistently held that all flat sum licenses are discriminatory in operation against interstate commerce. In the McGoldrick case, supra, it was pointed out:

> "The rule of *Robbins v. Shelby County Taxing District*, supra, has been narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

This Court has never said that there is any impropriety in the levy of a flat sum license on the incident of delivery. The complaint is here made that such a tax could be levied in any municipality in which wholesale groceries are delivered. This identical complaint

was reviewed in detail in the McGoldrick case, supra, and in that case the Court held that this was not sufficient to invalidate the tax.

II

The power to license trade, businesses and professions is granted Alabama municipalities by Section 735 of Title 37, of the Alabama Code of 1940. The final section of this statute reads as follows:

> "The power to license conferred by this article may be used in the exercise of the police power as well as for the purpose of raising revenue, one or both."

The power to license necessarily carries with it the power to classify businesses for license purposes both from the standpoint of the exercise of the police power and for revenue. In the instant case the license classifies wholesale grocers delivering groceries from a point without the city to a point within the city, in one category, and wholesale grocers within the city, in another category. The question thus presented is whether this is a reasonable classification.

If it is a reasonable classification the ordinance is valid, and if unreasonable the same is discriminatory.

In a long line of cases the Supreme Court of Alabama has held that a schedule of licenses may be prescribed for itinerant persons, firms or corporations, different from that prescribed for one having an established place of business in the city, and that such a classification has a reasonable basis and is not inherently discriminatory.

American Bakeries Co. v. City of Opelika, 229 Ala. 388, 157 So. 206

American Bakeries Co. et al v. City of Huntsville, 232 Ala. 612, 168 So. 880, appeal dismissed *American Bakeries Co. v. City of Huntsville*, 57 S. Ct. 122, 299 U. S. 514, 81 L. Ed. 380.

City of Roanoke v. Robertson, 30 Ala. App. 1, 200 So. 437, Cert. denied 200 So. 439

City of Enterprise v. Fleming, 240 Ala. 460, 199 So. 691

Woco Pep Co. of Montgomery v. City of Montgomery, 219 Ala. 73, 121 So. 64

Edgil v. City of Carbon Hill, 214 Ala. 532, 108 So. 355

Town of Guntersville v. Wright, 223 Ala. 349, 135 So. 634

Sanford v. City of Clanton, 31 Ala. App. 253, 15 So. 2d 303, Cert. denied 244 Ala. 671, 15 So. 2d 309

State v. Coca-Cola Bottling Works, 29 Ala. App. 508, 198 So. 363

State v. Cater, 194 Iowa 667, 169 N. W. 43.

The reasonable basis for this classification is aptly stated in *State v. Cater*, supra, as follows:

> "The usual justification offered for the imposition of a license upon transient merchants is to insure proper contribution from such merchants for police protection and to protect local dealers against unfair competition by transient dealers who come and go so quickly as to escape their share of general taxation in the community, and it may be admitted that the reasons so advanced are sound

and that reasonable license fees so exacted can well be upheld."

The necessity for such a classification by the municipalities in the exercise of their police power is obvious. Itinerant merchants are constantly offering goods for sale. They have no fixed place of business and are here today and are gone tomorrow. They have no financial responsibility to protect the purchaser. Often the goods sold are inferior in quality and the sales are based on fraud and misrepresentation. As a part of its police power the municipalities must exercise its licensing power for the protection of the public. We make no intimation that the Appellant in this case falls in this category but this license is applicable to all itinerant and transient wholesale grocers.

In the *American Bakeries Co. v. City of Huntsville*, supra, the Supreme Court of Alabama held as follows:

> "The provision of the ordinance in question applying to itinerant dealers is aimed and leveled at every person and every class who undertake to carry on the business of an itinerant dealer, trader, or seller of the products enumerated in the license schedule. *In this respect there is no discrimination or inequality, but perfect equality and uniformity.* Such being the case, we do not see that it conflicts in any way with the Federal Constitution. (citing *Dozier v. State*, 154 Ala. 83, 46 So. 9, 129 Am. State Rep. 51). *Equality and uniformity consist in the imposition of a like tax upon all who engage in the avocation, or who may exercise the privilege, taxed.* There is nothing in the ordinance imposing a license tax on itinerants (*which comprehends citizens of this State as well as citizens of other states*) which in the remotest

degree abridges the privileges and immunities of citizens of other states in favor of any resident class.

We wish to emphasize that the classification is not inherently discriminatory. Under Alabama practice and procedure it was necessary for the Appellant's complaint to allege the facts constituting a discrimination. The mere allegation that the ordinance is discriminatory is a conclusion of the pleader and is not admitted by the demurrer.

American Bakeries v. City of Huntsville, 168 So. 880-883, 232 Ala. 612

City of Troy v. Western Union Telegraph Co., 51 So. 523, 164 Ala. 482

27 L. R. A. 627

Van Hook v. City of Selma, 70 Ala. 361

Southern Liquid Gas Co. v. City of Dothan, 44 So. 2d. 744, 253 Ala. 350

Nippert v. City of Richmond, 327 U. S. 416, 66 S. Ct. 596

The case was decided in the Lower Court on the demurrers which tested the legal sufficiency of the complaint. The facts were not considered. The demurrer was properly sustained because there were no facts alleged in the complaint to overcome the presumption of the validity of the ordinance. We quote from the dissenting opinion in *Nippert v. City of Richmond*, supra, as follows:

"I think that one who complains that a state tax, though not discriminatory on its face, discriminates against interstate commerce in its actu-

al operation should be required to come forward with proof to sustain the charge. See *Southern Railway Co. v. King*, 217 U. S. 524, 534-537, 30 S. Ct. 594, 596, 597, 54 L. Ed. 868. This does not, of course, require proof of the obvious. But as Mr. Justice Brandeis pointed out, cases of this type should not be decided on the basis of speculation; the special facts and circumstances will often be decisive. *City of Hammond v. Schappi Bus Line*, 275 U. S. 164, 170-172, 48 S. Ct. 66, 68, 69, 72 L. Ed. 218. Without evidence and findings we frequently can have no 'sure basis' for the informed judgment that is necessary for decision. *Terminal Railroad Assoc. v. Brotherhood*, 318 U. S. 1, 8, 63 S. Ct. 420, 424, 87 L. Ed. 571."

CONCLUSION

Section 130(a) of the Ordinance of the City of Opelika levies a license on the local incident of delivery and hence it does not violate the Commerce Clause of the Constitution. Under their police powers, municipalities have a broad discretionary power to classify trades, businesses and professions for license tax purposes. A classification by a municipality is presumptively valid and the burden rests on the party challenging the validity of such classification to allege and prove facts showing that the classification is discriminatory. The classification by the City of Opelika, as set forth in Section 130(a) of the ordinance is presumptively a valid classification based on a legal exercise of its police powers. The appellant's original bill of complaint did not allege any facts showing or tending to show that this classification was discriminatory and hence the demurrers to the complaint were properly sustained.

The Appellee respectfully submits that the judgment of the Lower Court should be sustained.

Respectfully submitted,

Lawrence K. Andrews,
Attorney for Appellee.

Lawrence K. Andrews,
American National Bank Building,
Union Springs, Alabama.

PROOF OF SERVICE

I, Lawrence K. Andrews, Counsel of Record for the Appellee, City of Opelika, Alabama, hereby certify that I have served a copy of the foregoing Brief on the Merits on the Honorable M. R. Schlesinger, 1700 N. B. C. Building, Cleveland, Ohio, Counsel of Record for the Appellant, by depositing a copy of the same in the United States Postoffice at Union Springs, Alabama, first class mail, with postage prepaid, addressed to him at his said postoffice address.

Witness my hand this the 9 day of April, 1957.

Lawrence K. Andrews
Counsel of Record for Appellee